NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2022] NZLCDT 27
LCDT 012/21

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE 3** Applicant
AND	**STEPHEN POTTER** Respondent

DEPUTY CHAIR
Judge J G Adams

MEMBERS OF TRIBUNAL
Ms G Phipps
Mr H Matthews
Ms M Scholtens QC
Prof D Scott

HEARING 16 May 2022

HELD AT Tribunals Unit, Wellington

DATE OF DECISION 27 July 2022

COUNSEL
Ms P K Feltham for the Standards Committee
Mr S Potter the Respondent

DECISION OF THE TRIBUNAL RE CHARGES

[1] All these charges relate to the same client whom Mr Potter regarded as a friend. Mr Potter was vulnerable to falling foul of the rules because he lacked support or guidance from any mentor. He now acknowledges that he would not be facing these charges if he had recognised and observed professional boundaries. Had he done so, he would have refused to act for his friend. To those themes of concern, we add his general disorganisation.

[2] This hearing is to determine Mr Potter's liability on three charges:[1] two of unsatisfactory conduct and one (admitted) of misconduct. They are:

- One charge of unsatisfactory conduct that he failed to act in a competent and timely manner (negligence or incompetence) so as to bring the profession into disrepute (s 241(c) of the Lawyers and Conveyancers Act 2006 (the Act)).

- The admitted charge of misconduct that he provided regulated services for the client other than in the course of his employment (s 241(a) and s 9(1)(a) of the Act)).

- The other charge of unsatisfactory conduct that he breached regulation 10 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 (ss 241(b) and 12(c) of the Act)).

What are the relevant facts?

[3] The Standards Committee case is based on a bundle of more than 400 pages comprising an affidavit (with attachments) by the client and another affidavit (with attachments) by a Legal Standards Officer. Mr Potter filed a response but did not file any affidavit. At the hearing, Mr Potter cross-examined the client. Mr Potter initially preferred not to give evidence but, when his submissions strayed into disputed areas

[1] There were four charges, but one was an alternative to charge 2 which Mr Potter has admitted.

of fact, we required him to provide evidence within a structured format and he took an affirmation. Pursuant to ss 236 and 239 of the Act, we treat his factual assertions as evidence, whether before or after he formally took an affirmation.

[4] Little of direct relevance to the charges was directly challenged by Mr Potter with the exception that he disputed having received a cash sum of $2,000 from the client.

[5] In October 2014, following disciplinary proceedings, Mr Potter was prohibited from practising on his own account. Throughout the relevant period, he was (at least nominally) supervised by a sole practitioner. Throughout that period, we find that Mr Potter was only able to practise law as an employee of the sole practitioner. It seems that Mr Potter's employment by the sole practitioner was somewhat haphazard as to salary, hours and location. Mr Potter seems to have been absent from Auckland frequently. Mr Potter was contemporaneously running a repiling business.

[6] Mr Potter advised the client in relation to a relationship property appeal to the High Court. This work was somewhat informal. It precedes the matters which gave rise to the discrete charges, but it is relevant to understanding the relationship between Mr Potter and the client. The work that gave rise to the charges involved:

- inter-related debt and bankruptcy proceedings (High Court and District Court proceedings) concerning a car;
- an employment dispute; and
- Care of Children Act proceedings in the Family Court.

[7] Mr Potter's engagement in relation to the relationship property appeal began in early 2014 but the critical defaults in that case occurred in November 2014. His engagement in the relationship property appeal is not relied upon by the Standards Committee for the charges but it is noted as relevant background. His involvement in the other three areas of legal activity occurred after October 2014. They are relied upon for proof of the charges. The following narratives are limited to matters of relevance to this decision about Mr Potter's liability in respect of the denied charges.

Background

The relationship between client and Mr Potter; relationship property appeal

[8] In early 2014, Mr Potter and the client were introduced by another lawyer ("S"). The client lived, or had lived, at S's home for a time. The client, a panel beater, had an interest in classic cars. The client had family law woes: he had appealed a Family Court decision about relationship property. S (who had not represented him in the Family Court) withdrew services regarding the appeal. The client recalls Mr Potter saying he could not represent him because he was then suspended but told the client he did not need another lawyer because Mr Potter would prepare his case for him, and the client could therefore represent himself at the appeal.

[9] Despite assurances that Mr Potter would have documents for the client in time for the appeal, it was only throughout the night prior to the appeal hearing that Mr Potter emailed speaking notes to the client. The last such email arrived at 7.22am on the day of the hearing (Friday 21 November 2014). The many pages of emails demonstrate that a great deal of work went into their preparation, but a lay litigant would struggle to develop a coherent case in court from such material. In addition, the late arrival of the materials gave the client insufficient time to read and understand it.

[10] From the materials available to us, it may well be that the client's case on appeal was weak but Mr Potter's contribution, albeit informally, as a friend, was of scant benefit to the client. The client broke off contact with Mr Potter. Mr Potter subsequently telephoned and apologised for letting him down and their friendly contact resumed.

How pursuit of a car drove the client to bankruptcy

[11] The client had two classic cars. He stored one in the lockup that Mr Potter rented for his repiling business. Mr Potter lent him the use of a van. The client stored his other classic car with S. The client moved to live on a boat at a marina. The client kept a low profile, having his mail sent elsewhere, not to the marina.

[12] In 2016, the client complained to Mr Potter that T, a company associated with S, had deprived him of the car he had stored with S. Mr Potter advised him to send an invoice and, if it was not paid, to issue a statutory demand. The client followed this

process. He filed liquidation proceedings against T. These documents were drafted by Mr Potter but filed by the client as a litigant in person.

[13] In September 2016, in a fully reasoned decision, the High Court stayed the liquidation proceedings upon the basis that the amounts claimed by the client were the subject of a genuine dispute. The client, who had appeared on his own behalf, was ordered to pay costs and disbursements of $8,773.50.

[14] Although the client claimed he had not been advised that failure could result in costs against him, we note that he had earlier experienced this outcome in his relationship property proceedings. We doubt his veracity about his claimed ignorance regarding exposure to costs.

[15] In October 2016, T issued a bankruptcy notice against the client for his failure to pay the costs. In November 2016, the client filed proceedings in the District Court against T claiming unjust enrichment of $26,000 plus interest. T defended.

[16] Mr Potter prepared documents to set aside the bankruptcy notice, but the documents filed (by the client in person) seemed to lack an affidavit by the client. The application to set aside the bankruptcy notice was set down for 1 December 2016 in the High Court at Auckland. Mr Potter's employer, the sole practitioner, assured the client Mr Potter would appear. He did not do so. Mr Potter telephoned the client on the morning of the hearing to advise he would not be appearing.

[17] On 7 December 2016, the client's application to set aside the bankruptcy notice was dismissed because no affidavit had been filed by the client, a procedural requirement. The client was ordered to pay another $2,208 costs. One week later, T applied to have the client adjudicated bankrupt.

[18] The District Court claim by the client for unjust enrichment was set down for hearing on 12 May 2017. Because Mr Potter failed to appear, the claim was struck out; judgment was entered for T on its counterclaim of $7,507.72 and disbursements of $7,302.50. A fortnight later, the client applied to set aside the default judgment of the District Court. In June 2017, the High Court halted the bankruptcy application pending the outcome of the District Court proceedings. The client was ordered to pay costs of $446.

[19] On 23 August 2017, the client's District Court case against T was dismissed. On that occasion, both the client and Mr Potter appeared. The client was ordered to pay costs and disbursements of $3,925.

[20] The bankruptcy application had been adjourned by the High Court to 21 September 2017. On 19 September, the High Court emailed Mr Potter's employer to remind him of the hearing. The client was not advised of the date. He was adjudicated bankrupt. Costs were ordered against him. Mr Potter did not advise the client of these adverse outcomes.

Family Court proceedings

[21] In April 2017, the client engaged Mr Potter to act for him in relation to proceedings about the client's children. In August 2017, Mr Potter signed documents whereby he became the solicitor on the record for the client in those proceedings. The arrangements between the client and Mr Potter broke down. From mid-October, the client wanted to access materials from the court but could not do so because Mr Potter was still on record as his solicitor. Although on 9 November 2017, Mr Potter signalled to the court his intention to withdraw, he failed to file the necessary document until 17 January 2018, thereby impeding the client from accessing documents he wanted for a hearing scheduled in January 2018.

Employment dispute

[22] The client had an employment dispute. Because non-lawyers can represent an employee, Mr Potter believed he could act as representative outside his role as a lawyer. He provided a letter of engagement to the client to assist the client with his employment dispute, to provide advocacy services by notifying the employer of a personal grievance, representing the client in mediation and at the Employment Relations Authority.

[23] Mr Potter sent the client a six-page letter setting out his terms of engagement[2] as an employment representative. This was sent on 27 June 2017, coincident with his demand that the client pay him money (described below). Although the terms of

[2] Bundle, 283 – 288.

engagement speak of a contingency basis (no win, no pay), they include non-contingency work at $375 per hour for representations at hearings.

Money matters

[24] According to the client's affidavit, in late June 2017, Mr Potter telephoned the client and told him "that unless I could get him some immediate cash he would have to withdraw from my District and High Court cases and from the Family Court proceedings."[3] A few minutes later, Mr Potter fixed the sum at $8,000.[4] Mr Potter asked him to pay the money directly to him.[5] These allegations were not challenged in cross-examination.

[25] The client paid $5,800 into Mr Potter's bank account ($1,800 on 4 July, and $4,000 on 10 August 2017). These sums were not paid into his employer's trust account.

[26] The client says he paid $2,000 cash to Mr Potter on 27 July 2017. The client recorded a video in which he stated he was about to pay this sum but his recording fails to corroborate the alleged payment. Thus, the client's evidence is not verified by any independent source. Mr Potter disputes this payment.

[27] The standard of proof in this matter is the balance of probabilities. We were not impressed by the veracity of the client. We did not accept his claimed ignorance that unsuccessful proceedings could result in costs. Some of his assertions about the car dispute was at odds with findings in the High Court decision. We were not convinced by his evidence that a person can transfer ownership of another person's motor vehicle without any action by the owner. We treat his evidence with caution.

[28] We found Mr Potter to be the more credible witness. On the balance of probabilities, we find for Mr Potter on the allegation about the $2,000 cash.

[29] The client alleged he also paid $200 cash to Mr Potter on two occasions. This may have been so but we are unable to find any such sum was related to legal work. Mr Potter had provided secure storage for the client's other classic car for a

[3] Bundle, 19, para [67].
[4] Bundle, 19, para [69].
[5] Bundle, 19, para [70].

considerable time. The client had the use of Mr Potter's van. We find, against the evidence of the client, that the van was operable. We find that the client abandoned it in West Auckland and Mr Potter had to retrieve it. We do not find that such small sums, if paid, were for legal work.

[30] In summary, we find that $5,800 was paid for legal work, none of which was paid into the sole practitioner's trust account.

Are the charges proved?

[31] We have no hesitation in finding the first charge proved, namely unsatisfactory conduct that he failed to act in a competent and timely manner (negligence or incompetence) so as to bring the profession into disrepute. Failures include:

- Failure to attend court on 1 December 2016, 12 May 2017 and 21 September 2017. These were all important hearings where the client was left exposed and suffered loss.

- Failure to ensure an affidavit accompanied the application to set aside the bankruptcy notice.

- Failure to advise the client that he had been made bankrupt.

- Failure to withdraw as counsel on the record in the Family Court proceedings. This ongoing failure caused the client significant disadvantage in preparing for a hearing.

[32] An isolated failure to appear at court or to ensure all the documentation was filed, might be excusable but these failures indicate a generally disorganised negligence. Mr Potter's conduct, overall, indicates a lack of professional care for his client's interests. We find that the number of failures cannot be excused. The reputation of the profession itself is called into question if such conduct were excused.

[33] Mr Potter admitted the charge that he provided regulated services for the client other than in the course of his employment. This relates to his accepting engagement as the client's employment representative when he was only permitted to undertake legal work as an employee.

[34] Although Mr Potter admitted the charge, we requested further submission from the Standards Committee to satisfy ourselves that Mr Potter had infringed s 9(1)(a) of the Act. Our request centred on whether the services for which Mr Potter contracted were regulated services. A non-lawyer can act as an employment representative. Could Mr Potter contract to do so for the client in a manner that avoided his acting as a lawyer? The services are not necessarily "regulated services."

[35] Ms Feltham provided additional submissions. Mr Potter has replied, submitting that the relationship governing the employment work was one of friendship. This seems at odds with the technical letter of engagement he sent at the time. We are unable to find in his favour on that point. Mr Potter also submits that the work in which he engaged did not include all the possible kinds, for example, there was no appearance before a tribunal or court. We do not see that this makes a material difference.

[36] On the facts of this case we conclude that Mr Potter was providing regulated services when acting as the client's employment representative. Therefore, he breached s 9(1)(a) of the Act. Members of the public are entitled to expect professional standards of conduct, competence and accountability from those who are admitted to the bar, whether or not the service can be carried out by lay advocates.

[37] We find that the lawyer-client relationship between Mr Potter and the client was well-established by June 2017. Mr Potter had been engaged in family law matters, and in complex debt and bankruptcy issues in both High Court and District Court. It would have been a straightforward thing to undertake his work as employee of the sole practitioner. We find that Mr Potter deliberately tried to avoid the employment work falling within the ongoing other range of work he was undertaking for the client (necessarily done via Mr Potter's employment by the sole practitioner). Whether he was trying to avoid the restriction on his legal practice, or whether it suited him better to ensure he was not reliant on the sole practitioner to pay him, we are satisfied Mr Potter constructed the apparent "extra-legal" arrangement to suit his purposes, it had no balanced benefits for the client. We are not satisfied that the client understood the distinction upon which Mr Potter might have attempted to rely, had he defended this charge.

[38] Although it is not on all fours with these facts, the recent decision of the Environment Court in *Port of Tauranga Limited v Bay of Plenty Regional Council*[6] is a case where a suspended lawyer was not permitted to appear as a non-lawyer representative even though the statute permitted non-lawyers to do so. There, as in our present case, it would seem like the practitioner taking advantage of a loophole to do so. On the facts in this case, we do not find it was available to Mr Potter to take that position. Accordingly, we find the second charge proved.

[39] The third charge is clearly established. By accepting funds paid on account of fees directly into his own account, Mr Potter breached Regulation 10 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 which require funds paid in respect of professional services to be retained in a trust account. This was a deliberate act to avoid the lawful requirements. We find that the conduct is unsatisfactory within s 12(c) of the Act.

[40] Accordingly, a penalty hearing shall be set down for half a day. Unless otherwise ordered, the Standards Committee shall file submissions by 18 August 2022; Mr Potter shall file written submissions by 8 September 2022.

DATED at AUCKLAND this 27th day of July 2022

Judge JG Adams
Deputy Chairperson

[6] *Port of Tauranga Limited v Bay of Plenty Regional Council* [2022] NZEnvC 092.